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IN THE

Supreme Court of the United States

October Term, 1967

No. 549

HERMAN SIEGELSON,
Petitioner,

against

STATE OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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INDEX

	PAGE
Citations to Cases Below	i
Jurisdiction	1
Questions Presented	2
Constitutional Amendments Involved	3
Statement	4
Reasons for Granting Writ	5
Conclusion	10
Appendices:	
New York Court of Appeals Judgment of Affirmance, No Opinion	1a
New York Court of Appeals Remittitur	2a
Appellate Division Order of Affirmance, No Opinion	4a

Citations to Cases

Carter v. State of Illinois, 329 U.S. 173, 67 S.Ct. 216	7
Escobedo v. State of Illinois, 378 U.S. 478, 84 S. Ct. 1758	6
Gadsden v. United States, 223 F. 2d 627	7, 8
Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792	6
Gilbert v. State of California, 386 U.S. —, 87 S.Ct. 1961	6

PAGE

Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199 6

Miranda v. State of Arizona, 384 U.S. 436, 86 S.Ct. 1602 ..... 6, 8

Phelps v. State, 158 Tex. Cr. 510, 257 S.W. 2d 302 .. 6

Pointer v. State of Texas, 380 U.S. 400, 85 S.Ct. 1065 6

Specht v. Patterson, 386 U. S. —, 87 S.Ct. 1209 9

State v. Harvey, 128 S.C. 447, 123 S.E. 201 6

Stoval v. Denno, 386 U.S. —, 87 S.Ct. 1867 6

Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252 .... 9, 10

United States v. Tribote, 297 F. 2d 598 7

United States v. Wade, 386 U.S. —, 87 S.Ct. 1926 .. 6

Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079 ..8, 9, 10

Constitutional Amendments Involved

Fifth Amendment 3

Sixth Amendment 3

Fourteenth Amendment 3

Statute Cited

Section 452 of the New York Penal Law 4

IN THE

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No.

HERMAN SIEGELSON,

Petitioner,

against

STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

HERMAN SIEGELSON, the defendant-appellant below, prays that a Writ of Certiorari issue to review the affirmance of the judgment of the New York Court of Appeals entered in the above entitled case, on May 16, 1967.

Citations to Case Below

There were no opinions in the Courts below. The case is reported in 26 A.D.2d 619, 271 N.Y.S.2d 170, and affirmed in 19 N.Y.2d 889, 281 N.Y.S.2d 84. Reargument was denied in — N.Y.2d —, — N.Y.S.2d —, on June 1, 1967.

Jurisdiction

The judgment of the New York Court of Appeals was entered on May 16, 1967. Reargument was denied on June 1, 1967. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3). The federal questions herein

presented were raised in the normal appellate process and were the only questions argued and briefed in the New York Court of Appeals. The New York Court of Appeals remittitur reads as follows:

> "Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Defendant contended that he was denied due process of law under the Fourteenth Amendment to the United States Constitution, and also, that he was denied assistance of counsel under the Sixth Amendment to the United States Constitution. The Court of Appeals held that there was no denial of any constitutional right of the defendant."

Questions Presented

1. Whether petitioner's constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution were violated under circumstances wherein an ex parte conference was held between the District Attorney and sentencing Justice, concerning the sentence to be imposed upon petitioner, without notice to petitioner or his counsel, during which conference the District Attorney vehemently advocated, at great lenth, the merits of his position that petitioner should be incarcerated?

2. Whether this ex parte conference at which a commitment to incarcerate petitioner was agreed upon between the District Attorney and the sentencing Justice, and which was held immediately prior to the actual imposition of sentence in Court, was a critical stage in the proceedings that required notice to petitioner and his counsel, so as to assure that the subsequent sentence proceeding was not a mere formality, and, in effect, only the pronouncement of the sentence already agreed to by the District Attorney and sentencing Justice?

3. Whether our adversary system permits, after guilt is determined, ex parte access to the sentencing Justice, by the District Attorney, on the critically important question of an accused's liberty or imprisonment?

4. Whether our adversary system contemplates, on the question of punishment, the same privileged status to be accorded a District Attorney as in the case of a probation officer?

5. Whether our adversary system condones the pressure brought to bear upon a sentencing Justice by the advocacy of a District Attorney vehemently arguing, ex parte, the merits of his position that petitioner be incarcerated.

Constitutional Amendments Involved

The applicable provisions in pertinent part, of the Fifth, Sixth and Fourteenth Amendments are as follows:

Amendment V

"No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *."

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, * * *; to be confronted with the witnesses against him; * * * and to have the Assistance of Counsel for his defense."

Amendment XIV

"Section 1. * * *; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement

The petitioner, a jewelry merchant for over 20 years, was the first person prosecuted under a newly created statutory misdemeanor crime [Section 452, Penal Law of New York, Added L. 1962, C. 872, eff. Sept. 1, 1962]. This section makes it a misdemeanor to sell an artifically colored diamond [*i.e.*, a genuine diamond enhanced as to color by an artificial process] *without a writing,* informing the purchaser of such fact. Petitioner pleaded guilty to its violation.

After making full restitution and cooperating with the District Attorney's office, the petitioner appeared for sentence. Immediately prior to the imposition of petitioner's sentence in open Court, there took place an ex parte conference in the sentencing Justice's chambers, between the prosecutor and sentencing Justice, which concededly concerned the sentence to be imposed upon petitioner. At this conference, which took place in the absence of notice to the accused and his counsel, the District Attorney vehemently advocated, at great length, the merits of his position that petitioner be incarcerated. After a lengthy and provocative appeal to the sentencing Justice, totalling forty-five minutes of unchallenged advocacy, the sentencing Justice was pressured into a commitment to incarcerate the petitioner. As a result, the actual sentence proceeding took place during the ex parte conference, and the proceeding in Court, which followed immediately thereafter, was, in effect, a mere formality involving the pronouncement of sentence already decided upon in chambers between the District Attorney and sentencing Justice.

At no time has respondent ever challenged the correctness of petitioner's allegation that the prosecutor, without notice to the petitioner and his counsel, and in their absence, pressured the sentencing Justice to incarcerate the

petitioner herein. In this connection the sentencing Justice stated at page 22 of the record:

> "And I strangled myself in this case; and I had the District Attorney in, and I argued with him for forty-five minutes."

Thus, the vehement and lengthy ex parte advocacy of the prosecutor-adversary, tainted and compromised the essential basis for a fair sentence proceeding, at a critical stage, and resulted in the sentencing Justice's loss of judicial objectivity. Because of the foregoing, the relief sought below was a vacatur of petitioner's sentence of 60 days in the Penitentiary, and a resentence before a different justice who would then hear both adversaries at the same time and in the same proceeding.

The Appellate Division of the Supreme Court of the State of New York, First Department, unanimously affirmed the judgment of conviction, without opinion. The New York Court of Appeals unanimously affirmed the judgment of conviction, without opinion.

Reasons for Granting the Writ

1. The decision below permits the continuation of a generally surreptitious and privileged practice, of ex parte access to the judge, by the prosecutor, concerning the merits of the latter's position. These ex parte conferences, on the question of punishment, are engaged in by the prosecutor and judge and are held without notice to the accused or his counsel. This, consequently, deprives an accused of his right to the assistance of counsel and his right to be meaningfully heard during the ex parte conference, at a time when the critically important issue of his liberty or imprisonment is decided.

Although there is no decision in New York regarding an accused's right to the assistance of counsel during an

ex parte conference between the prosecutor and sentencing Justice, other State Courts have vacated sentences under similar circumstances. (*State* v. *Harvey* [So. Car.], 123 S.E. 201, 128, S.C. 447; *Phelps* v. *State* [Texas], 158 Tex. Cr. 510, 257 S.W.2d 302). In both *Phelps* and *Harvey*, the Appellate Courts set aside the sentences on the ground that in each instance the County Attorney and/or the County Solicitor discussed the question of punishment with the Judge who was to impose sentence in the absence of the accused and their counsel.

2. Since the right to effective assistance of counsel, to confrontation and to due process of law are made applicable to the States via the Fourteenth Amendment to the United States Constitution, then ex parte access to the sentencing Justice, by the prosecutor on the question of sentence, derogates from the accused's right to a fundamentally fair sentence proceeding. (*Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792; *Massiah* v. *United States*, 377 U.S. 201, 84 S.Ct. 1199; *Escobedo* v. *State of Illinois*, 378 U.S. 478, 84 S.Ct. 1758; *Miranda* v. *State of Arizona*, 384 U.S. 436, 86 S.Ct. 1602; *Pointer* v. *State of Texas*, 380 U.S. 400, 85 S.Ct. 1065; *United States* v. *Wade*, 386 U.S., — 87 S.Ct. 1926, 1932; *Gilbert* v. *State of California*, 386 U.S. —, 87 S.Ct. 1951; *Stovall* v. *Denno*, 386 U.S. —, 87 S.Ct. 1867). In *United States* v. *Wade, supra*, the Supreme Court held that an accused was entitled to the assistance of counsel at all critical stages of the criminal proceeding, "formal or informal, in Court or out, * * *." [Id. p. 1932]. The Supreme Court further stated that:

> "The presence of counsel at such critical confrontations [line-up], as at the trial itself, operates to assure that the accused's interests will be protected consistently with our *adversary theory of criminal prosecution.*" (emphasis supplied, id. p. 1932)

Unless the adversary theory of criminal prosecution terminates upon verdict, or plea of guilty, an accused is as much entitled to the assistance of counsel at the time his liberty and/or imprisonment is decided, as the "guiding hand of counsel" is needed to assure an accused due process of law in the determination of his innocence or guilt. There is no logical difference in criticalness in proceedings leading to a determination of guilt or innocence, and proceedings following such determination relative to the question of an accused's liberty or imprisonment. (*United Tribote*, 297 Fed. 2d 598, 601; *Gadsden* v. *United States*, 223 F. 2d 627, 630, 631.) In *Tribote, supra,* the United States Court of Appeals [2d Circ.] recognized that the regularity and fundamental fairness of the sentence proceeding is of particular significance in a case predicated upon a plea of guilty. At page 601 the United States Court of Appeals stated:

> "Indeed, in speaking of the importance of representation of counsel at this stage of the proceedings, the Supreme Court has suggested that under circumstances akin to those presented here, i.e., where conviction is on a plea of guilty, the aid of counsel may be more necessary than it is at the arraignment: '* * * It is a commonplace that no more difficult task confronts judges than the determination of punishment not fixed by statute. Even the most self-assured judge may well want to bring to his aid every consideration that counsel for the accused can appropriately urge. Carter v. People of State of Illinois, 329 U.S. 173, 178, 67 S. Ct. 216, 220, 91 L. Ed. 172 (1946).'" [Id. pp. 601, 602.]

In *Gadsden* v. *United States, supra,* the United States Court of Appeals [Dist. of Col.] stated with regard to the right of assistance of counsel at the sentencing stage, as follows:

> "The right to effective assistance of counsel at the sentencing stage of the proceeding is guaranteed by the Constitution. 'There is then a real need for counsel. * * * Then is the opportunity afforded for presentation to the Court of facts in extenuation

of the offense, or in explanation of the defendant's conduct; to correct any errors or mistakes in reports of the defendants' past record; and, in short, to appeal to the equity of the Court * * *'" [Id. at p. 630.]

3. In the case at Bar the sentencing Justice was pressured, in chambers, by the prosecutor to commit himself to incarcerate petitioner prior to the actual imposition of sentence in open Court. The record reveals [R. 22] that the sentencing Justice was subjected to a lengthy and provocative appeal, by the prosecutor, which pressured the Justice to arrive at a commitment to incarcerate the petitioner. Under these circumstances there was a total loss of that *judicial objectivity* which is necessary to accord an accused a fundamentally fair sentence proceeding. As the Supreme Court stated in *Miranda, supra.*

> "Privacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on * * *." [Id. at pp. 448, 1614.]

The presumed prejudice which inheres in, and the aroused suspicions, which result from, an ex parte conference, because of its inconsistency with our adversary theory of criminal prosecution, was pointed out in *Gadsden, supra,* as follows:

> "'Time and again this Court has said that Justice must not only be done but must manifestly be seen to be done * * *.'" [Id. at p. 631.]

In the instant case the petitioner was deprived of his constitutional right to be present with counsel, to rebut, challenge, explain and/or contradict statements made by the prosecutor which were solely intended to influence the sentencing Justice in his determination of the sentence to be imposed.

4. The Supreme Court's decisions in *Williams* v. *New York,* 337 U.S. 241, 252 [ft. n. 18], 69 S.Ct. 1079, 1085;

Townsend v. *Burke*, 334 U.S. 736, 68 S.Ct. 1252 and *Specht* v *Patterson*, 386 U.S. —, 87 S.Ct. 1209 are not contra to the petitioner's position herein since the case at Bar involves an issue never specifically decided by this Court, viz., the constitutionality of an adversary's ex parte access to the sentencing Justice, without notice to the accused or his counsel, notwithstanding that the accused is subsequently heard in open Court.

The right to be meaningfully heard in open Court and to the effective assistance of counsel in open Court, depends in large measure upon what transpires in chambers. The argument advanced by respondent below is that the prosecutor's ex parte conference with the sentencing Justice must be likened to the privileged status of a probation officer and/or hearsay statements contained in a probation report. There is no analogy. The distinction in purpose and objective between a probation officer vis-a-vis a prosecutor is apparent. A probation officer is a neutral and detached functionary, specially trained to aid offenders, who operates in a distinctly non-adversary capacity. Whereas the District Attorney's capacity, although concerned officially, in seeing justice done, is as an adversary whose perspective is perforce, prosecutorial and not rehabilitative or judicial. Therefore, the State's attorney's partiality to his position is not only understandable, but expected and consistent with our "adversary theory of criminal prosecution". The Supreme Court's reasoning in *Williams* v. *State of New York, supra*, which was adhered to in *Specht* v. *Patterson, supra*, permitting the sentencing justice to receive probation reports, is certainly distinguishable from an adversary's unchallenged influence when advocating his cause in the absence of the accused and the accused's counsel. The distinction was succinctly stated in *Williams, supra*, at page 249:

> "Probation workers making reports of their investigations have not been trained to prosecute but to aid offenders."

Also pointed out, significantly, by the Supreme Court in *Williams*, was the following:

> "What we have said is not to be accepted as a holding that the sentencing procedure is immune from scrutiny under the due process clause. See Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1960". [Williams v. New York, ft. n. 18, at pp. 252, 1085.]

It is respectfully submitted that this Honorable Court must now determine an issue which transcends the instant case and affects the very integrity of our adversary system in criminal prosecutions, i.e., the influence and advantage of an adversary who is permitted ex parte access to the judge before whom the cause is pending.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

FRED QUELLER,
Counsel for Petitioner,
401 Broadway,
New York, N. Y. 10013.

ROBERT L. COHEN of New York City,
of Counsel.

August 25, 1967.

APPENDIX

New York Court of Appeals Judgment of Affirmance, No Opinion

BE IT REMEMBERED, That on the 21st day of March, in the year of our Lord one thousand nine hundred and sixty-seven, Herman Siegelson, the appellant in this cause, came here unto the Court of Appeals, by Fred Queller, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Robert Louis Cohen, of counsel for the appellant, and by Mr. Eric A. Seiff, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

New York Court of Appeals Remittitur

STATE OF NEW YORK

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the First day of June A. D. 1967.

Present:

HON. STANLEY H. FULD, Chief Judge, presiding.

Mo. No. 626

THE PEOPLE &c.,

Respondent,

vs.

HERMAN SIEGELSON,

Appellant.

A motion having heretofore been made herein upon the part of the appellant for reargument, for a stay, and/or to amend the remittitur in the above cause to this Court, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks reargument and a stay, be and the same hereby is denied, and it is

ORDERED, that the said motion, insofar as it seeks amendment of the remittitur, be and the same hereby is granted. The return of the remittitur is requested and, when returned, it will be amended by adding thereto the following:

New York Court of Appeals Remittitur

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Defendant contended that he was denied due process of law under the Fourteenth Amendment to the United States Constitution, and also, that he was denied assistance of counsel under the Sixth Amendment to the United States Constitution. The Court of Appeals held that there was no denial of any constitutional right of the defendant.

And the Supreme Court of New York County hereby is requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

(A Copy)

George Kimball,
Deputy Clerk.

Appellate Division Order of Affirmance, No Opinion

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 23rd day of June, 1966.

Present:

Hon. Benjamin J. Rabin,
Justice Presiding,
" Harold A. Stevens,
" Samuel W. Eager,
" Aron Steuer,
" Louis J. Capozzoli,
Justices.

10389—10390

The People of the State of New York,
Plaintiff-Respondent,

against

Herman Siegelson,
Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County, rendered on the 6th day of December, 1965, convicting defendant of the crime of selling artificially colored diamonds, in violation of § 452 of the Penal Law, and said appeal having been argued by Mr. Fred Queller, of counsel for the appellant, and by Mr. Eric A. Seiff, of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

Enter

Frank H. Crabtree
Deputy-Clerk.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
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IN THE

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HERMAN SIEGELSON,

Petitioner,

v.

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	
The *ex parte* conference between the judge and prosecutor prior to sentencing did not violate petitioner's rights under the Fourteenth or Sixth Amendments to the United States Constitution	4
a. The record does not support petitioner's factual allegations	4
b. Petitioner was not denied the right to confront witnesses against him	5
c. Petitioner was not denied the right to effective counsel	8
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:

Canizio v. New York, 327 U. S. 82, 86	8
Escobedo v. Illinois, 378 U. S. 478	9
Stovall v. Denno, 386 U. S. ——	9
People v. Peace, 18 N.Y.2d 230, 385 U. S. 1032	8
People v. Siegelson, 19 N.Y.2d 889, 19 N.Y.2d 1018	3
Williams v. New York, 337 U. S. 241	7, 9

Statutes:

N.Y. Penal Law §452	2
N.Y. Penal Law §1290	2
N.Y. Penal Law §1937	2

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HERMAN SIEGELSON,

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v.

THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Question Presented

Whether petitioner's rights to due process, effective counsel, or confrontation were violated when the sentencing justice requested and thereafter held a conference with a prosecuting attorney relative to sentence in the absence of petitioner and his lawyer?

Statement of the Case

Petitioner was indicted, on an indictment filed July 2, 1965, by a New York County Grand Jury charging three counts of CRIMINALLY SELLING ARTIFICIALLY COLORED DIAMONDS (N.Y. Penal Law §452) and three counts of GRAND LARCENY (N.Y. Penal Law §1290). The acts charged in the indictment included the sale of a $2,000 tinted diamond to a police undercover agent for $4,250 (59).* The audacity of petitioner was confirmed when the diamond sold to the undercover agent was boiled in acid by the police to remove the tint and returned to petitioner on the grounds that it had faded (59). Petitioner with no difficulty retinted the stone and returned it the next day (59). Police seized 270 gems at the time of his arrest; the stones were analyzed and in the opinion of the Gemological Institute of America were tinted (20-1).

On July 23, 1965, petitioner pleaded guilty to three misdemeanor counts of selling artificially colored diamonds, punishable by a maximum of one year and/or $500 maximum fine on each count (N. Y. Penal Law §1937) (10-13). On October 11, 1965, petitioner was arraigned for sentencing. In response to a defense contention that incarceration would close petitioner's business and put four families out of work, the court stated:

> "I am not doing anything. I am not putting anybody out of work. I am not closing anybody's business. And I am only here as a Judge, to try to do what is right. And I strangled myself in this case;

---

*References are to the pages of the printed Appellate Division Record on Appeal.

> and I had the District Attorney in, and I argued with him for forty-five minutes. And I had the Probation Department in, and I'm trying to do whatever is possible to help him, because I'm a pretty decent, humane individual. So don't throw the onus upon me as being an individual that's putting anybody out of business, or destroying families * * *'' (22).

Petitioner was sentenced to three months' imprisonment on one count, and a fine of $500 on each of the two other counts (15, 25).

Thereafter by motion, petitioner moved the trial court for a suspension of the jail sentence imposed, submitting letters and affidavits from employees, friends, and physicians. Finally, on December 6, 1965, the trial court modified the earlier sentence by reducing the length of incarceration to two months (66-7).

Having made no objection to the sentencing court as to the sentencing procedure employed, petitioner appealed to the Appellate Division, attacking the "excessiveness" of the sentence. Petitioner first raised the constitutional issues urged here in the Court of Appeals. That court rejected those claims [*People* v. *Siegelson,* 19 N.Y. 2d 889, 19 N.Y. 2d 1018 (motion to amend remittitur granted)].

ARGUMENT

The *ex parte* conference between the judge and prosecutor prior to sentencing did not violate petitioner's rights under the Fourteenth or Sixth Amendments to the United States Constitution [answering Petitioner's Brief].

a. The record does not support petitioner's factual allegations.

On October 11, 1965, the trial court heard arguments from petitioner's counsel and an assistant district attorney on the question of sentence. During that argument and in response to defense counsel's urgent appeal that incarceration would close petitioner's business and put four families out of work, the sentencing court, in a short statement revealing its sensitivity to the importance of the decision before it, mentioned that it had argued with an assistant district attorney in chambers about sentence for forty-five minutes (22). Thereafter, the court sentenced the defendant to two months in prison and fined him one thousand dollars (15, 25, 66-7).

From these facts petitioner draws the indefensible conclusion that the sentencing justice was "pressured" into incarcerating the defendant, that the sentencing justice lost his "judicial objectivity," and that the actual sentencing hearing was a "mere formality" (brief, pp. 4, 5). These conclusions are mere surmise. The record shows little as to what went on in chambers. The record does not tell what was urged on the judge. And we certainly may not conclude that whatever occurred had the inexorable psychological effect on the judge that is claimed here.

Further, the petitioner's unsupported claim of the effect of the *ex parte* conference should not obscure facts demonstrating the harmlessness of that interview. First, the sentence imposed for three counts, carrying a maximum three years imprisonment and/or $1,500 fine, was only two months and $1,000. Second, this conference in no way foreclosed defense counsel from arguing his client's case and reinforcing that argument with affidavits and letters which ultimately convinced the sentencing court to lower petitioner's prison term from three to two months. Third, it was the sentencing judge who summoned the district attorney to the conference. Fourth, there is no showing that the district attorney at that conference urged a position different from what he urged at the sentencing proceedings in open court. Finally, although afforded ample opportunity to object by the court's disclosure of this conference prior to actual sentencing, petitioner raised this question neither before the sentencing court nor before the intermediate appellate court.

b. Petitioner was not denied the right to confront witnesses against him.

Petitioner contends that the *ex parte* argument of the district attorney in chambers in the absence of defense counsel was in effect a denial of petitioner's right to confront and cross-examine witnesses, and rebut evidence against him. This in effect must mean that petitioner was denied the right to rebut the district attorney's sentencing position.

But that is just not the case here. The district attorney made his sentencing position quite clear at the initial

sentencing hearing. And petitioner's counsel does not deny that he had ample time and opportunity to counter that position. The record indicates that not only did he do so at the initial hearing, but in the weeks that followed he continued to reinforce that argument by letters and affidavits from friends and employees of petitioner.

Further, the procedural and evidentiary rules governing sentencing proceedings are not and ought not to be the same as those governing trial proceedings. The acknowledged aim of sentence procedures is to select from the available battery of rehabilitative and deterrent techniques those which will most likely affect the reformation of the particular offender and deter him from future criminal activity. This selection can only be intelligently made if the sentencing tribunal has before it as much information as it can gather about the particular offender. This information must come from many different quarters, from family, friends, and acquaintances of a defendant, from schools, probation officers and employers and from prosecutors and law enforcement agencies.

And it must come in the form of affidavit and epistle. This process of evidentiary submission ought not be restricted by "hearsay" rules. Nor ought the sources of the information be subjected to cross-examination in formal proceedings. To do so would not only occasion inordinate delay but also would cause informants, who desired their information to be confidential, to withhold that information. Ultimately, it would arrest the flow of information. And this primarily to the detriment of the individual accused. For, except in the case of multiple offenders, in-

formation about the background of the offender more often than not tempers punishment.

In *Williams* v. *New York*, 337 U. S. 241 (1949), this Court sustained the validity of this modern approach to sentencing procedure. Specifically *Williams* upheld the use by a court, in determining sentence, of information supplied by a prosecutorial agency *ex parte* that a defendant had participated in 30 burglaries for which he had not been convicted. Assuming that the "due process" clause of the Fourteenth Amendment, applicable to state criminal proceedings, guaranteed an accused's right to cross-examination of witnesses against him, Mr. Justice Black, speaking for this Court, held that that right, although applicable to the guilt stage of criminal proceedings, was not applicable to the punishment stage.

Williams thus upheld in the face of a constitutional attack, raising Sixth as well as Fourteenth Amendment questions, the sentencing practice of receiving *ex parte* information the source of which is not subject to cross-examination in open court. And it specifically upheld the use of such information from a prosecutorial organ of the state.

In the instant case, the sentencing court, apparently in an effort to gain either additional information or an added perspective on the difficult decision before it, "had the District Attorney in" (22). It also consulted a representative of the Probation Department, a fact which, in petitioner's view, apparently raises no constitutional issues. Thus, petitioner's argument that the prosecutor's access to the sentencing judge *ex parte* violates his due process right to confrontation of witnesses against him fails because that right does not guarantee him the privilege of cross-

examining the sources of sentencing information [cf. *People* v. *Peace,* 18 N.Y.2d 230 (1966), *cert. denied,* 385 U. S. 1032].

c. Petitioner was not denied the right to effective counsel.

Petitioner claims that the *ex parte* conference deprived him of "the right to counsel" at a "critical stage" of the proceedings against him. This claim is based on the dubious inference that because there was an *ex parte* conference and there was a two month jail sentence the sentencing hearing actually took place in chambers where petitioner was not represented.

The fact that petitioner's counsel was allowed time to argue his client's case and submit affidavits and letters from employees, associates and even petitioner's parent's physician, certainly belies any contention that petitioner was denied effective counsel at the sentencing proceeding; petitioner "* * * had counsel in ample time to take advantage of every defense which could have been available to him originally." [*Canizio* v. *New York,* 327 U. S. 82, 86 (1946).] And the reduction of the jail term from three to two months by the same judge who held the conference certainly negatives the contention that the sentence in this case was decided at that *ex parte* conference.

In short, that *ex parte* conference did not render petitioner's right to counsel a hollow right. It did not determine the outcome of the proceeding so inexorably as to render petitioner's counsel ineffective. Thus it was not a "critical stage" in the particular sense in which that phrase has come to be used in recent decisions of this

Court [*Stovall* v. *Denno*, 386 U. S. —— (1967); *Escobedo* v. *Illinois*, 378 U. S. 478 (1964)].

Further, this right to counsel argument is very similar to if not identical with petitioner's right to confrontation argument. It is so close in fact that this Court, in passing on the similar confrontation problems raised in *Williams* v. *New York, supra,* thought it necessary to remark in a footnote:

> "Other due process requirements mentioned in the *Oliver* case were that the defendant should be permitted to offer evidence in his own behalf and be represented by counsel. Appellant, however, was represented by counsel both when tried and sentenced, and the sentencing judge did not decline to permit introduction of any evidence" [*id.* at 245 n. 3].

Thus *Williams* reinforces the position that petitioner was not denied the right to counsel.

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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